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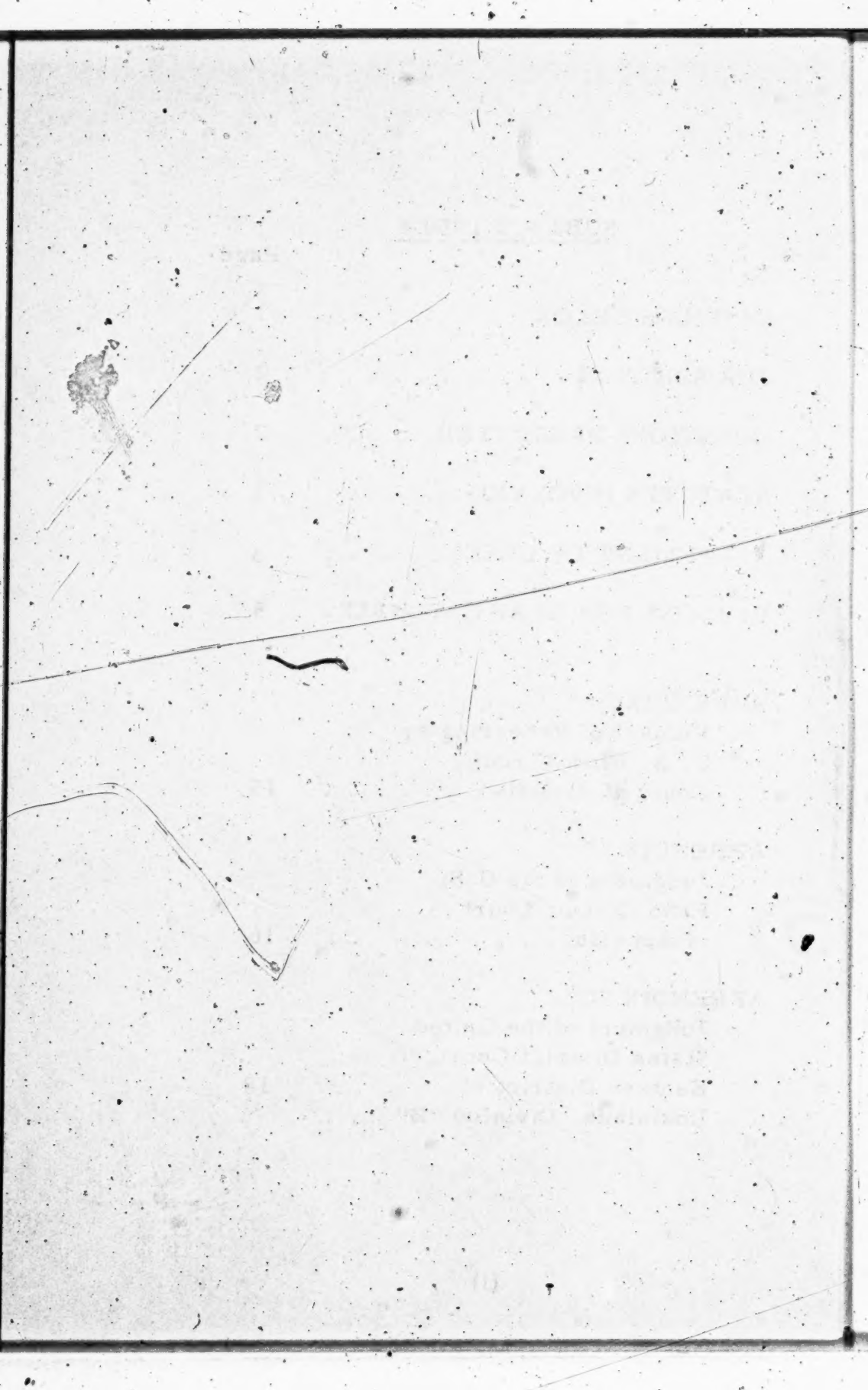

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NUMBER

WILL FOSTER

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Will Foster, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered November 4, 1966, rehearing denied on December 6, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern

District of Louisiana, Division B, printed in Appendix C hereto, was unreported. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix B hereto, is reported at _____ F 2d _____. The order of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing, printed in Appendix A hereto, was not reported.

JURISDICTION

The order of the United States Court of Appeals, Fifth Circuit, denying the Petition for Rehearing was denied on December 6, 1966, printed in Appendix A hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Whether or not a Reed v. Yaka shipowner, hiring longshoremen direct, has breached the warranty of seaworthiness when it assigned its employee to work ten feet above the regular deck/work level, without means of ingress or egress and without safety nets, at the same time cargo moved overhead?

(2) Whether or not an inverse loading procedure (I. E. first to the hatch/square, then to the wings) will create an unsafe place, so as to render a vessel unseaworthy?

(3) Is the adherence to a safety statute exempt from the warranty of seaworthiness when that shipowner is of the Reed v. Yaka type, hiring its longshoremen direct?

STATUTES INVOLVED

(1) General Maritime Law.

(2) Safety & Health Regulations for Longshoring

(a) Section: 9:32
(b) Section: 9:34
(c) Section: 9:43

STATEMENT OF CASE

On February 23, 1962, the petitioner was employed direct by Lykes Bros. Steamship Co., Inc., as a longshoreman, assigned to work aboard the SS ZOELLA LYKES, a vessel owned and operated by his employer. (R-48) The petitioner was assigned to work on top of a large box of household goods, 10 to 12 feet high and 5 by 5 foot wide (Dep.-6, 7, 9, 10, 11, 13 and 17) which was in the square or partially in the square of the hatch. (Dep.-11, 12) While standing on top of this large box of household goods, attempting to stow smaller boxes on top of the said large box (Dep.-11, 12, 13) a box of cargo fell from an overhead sling being transferred into the hold. (R-48, Dep.-14)

Standing on top the box of household cargo and seeing an overhead box falling towards him, the petitioner jumped to avoid a crushing blow of the falling box, thus injuring himself. (Dep.-15) On October 31, 1963, the petitioner filed a libel in rem and in personam against his employer claiming benefits pursuant to General Maritime Law and the Jones Act (46 USC 688).(R-48) In May of 1965 the shipowner filed a motion for a summary judgment, alleging there was no genuine issue of any material fact. (R-35) On September 1, 1965, the United States District Court for the Eastern District of Louisiana granted a summary judgment. (Appendix C) On September 30, 1965, present counsel, substituting for the prior counsel (R-19) filed an appeal in behalf of the petitioner with the United States Court of Appeals, Fifth Circuit. (R-20) On November 4, 1966, the appellate court affirmed the decision of the lower Court. (Appendix B) And a petition for a rehearing with the same United States Court of Appeals, Fifth Circuit, was filed on November 23, 1966.(R-2) And that petition was denied on December 6, 1966. (Appendix A)

REASONS FOR GRANTING WRIT

(1) The United States Court of Appeals for the Fifth Circuit has made reference to the case of McQuiston v. Freighters & Tankers Steamship Co., 5 Cir (1964), 327 F 2d 746 and Neal v. Lykes Bros. Steamship Co., Inc., 5 Cir (1962), 306 F 2d 313, as applicable herein. However, the petitioner submits that the mechanics of his accident in no way remotely resembles the lifting and twisting of his back by McQuiston or the conditions as complained by Neal.

The petitioner submits that the foregoing cases, given the widest credence, do not apply herein and do not in the least supply answers to the following problems posed herein:

(a) Will an inverse loading procedure (I. E. first to the hatch/square, then to the wings) create an unseaworthy condition?

(b) Is adherence to a safety statute exempt from the warranty of seaworthiness when that shipowner is of the Reed v. Yaka type, hiring its longshoremen direct?

(c) Has a Reed v. Yaka shipowner breached its obligation to its direct longshoreman when that longshoreman is assigned to work 10 feet atop a box of household cargo, without means of ingress or egress or safety nets, at the same time cargo is being moved overhead?

(2) Examining the accident to Will Foster it is obvious that the absence of safety nets, the absence of ingress and egress played some part in the mechanical proximate cause of his accident. Had ingress and egress been adequately provided he would not have had to make a choice between being crushed or jumping; and had safety nets been provided small cargo boxes would not have fell in his direction. And in this respect, the absence of safety nets and the absence of ingress and egress for this work area represented a violation of the following sections of the Safety & Health Regulations for Longshoring, Public Law 85-742 Stat 835 (Amending 44 Stat 1444, 33 USC 941), and R.S. 161, 5 USC 22:

"Section: 9:32

STOWED CARGO AND TEMPORARY LANDING PLATFORMS

(a) Temporary tables on which loads are to be landed shall

be of sufficient size and strength to permit the employees thereon to work in safety. (Emphasis ours)

(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of persons, falling, the edge shall be guarded by line, safety net or railing. (Emphasis ours)

(c) When two gangs are working in the same hatch on different levels, a safety net shall be rigged and securely fastened so as to prevent men or cargo from falling. Emphasis ours.

Section 9:34

SKELETON DECKS

(a) No cargo shall be worked on a skeleton deck, mechano deck or other superstructure unless temporary flooring is provided, when necessary, to make a safe working surface."

Counsel for the shipowner has heretofore argued that violation of a safety statute, if so, for a shipowner such as Lykes Bros. Steamship Co., Inc., which hires a longshoreman direct (See Reed v. Yaka, (1963)

373 US 410, 83 S Ct 1349) does not represent a breach of the warranty of seaworthiness, because said violation of a safety statute, if so, represents "operational negligence" and not unseaworthiness, and is thus exempt from the warranty of seaworthiness. And if the foregoing was considered the courts below have adopted that holding.

But the petitioner avers such is contrary to the spirit, if not the holdings, of such cases as Albanese v. N. V. Nederlandsch Americansh Stoomvaart Maatschappi (1965) 382 US 283, 86 S Ct 429; and Gutierrez v. Waterman Steamship Corp., (1963) 373 US 206, 83 S Ct 1185.

Petitioner avers that when Lykes Bros. Steamship Co., Inc. violates a safety statute that it violates first as a shipowner, in line with its primary corporate purpose, and second as a stevedore, as its ancillary purpose. But in either event, it renders the vessel unseaworthy. To hold otherwise is to vitiate the holdings of Mahnich v. Southern SS Co. (1944) 321 US 96, 64 S Ct 455 and Seas Shipping Co. v. Sieracki (1946) 328 US 85, 66 S Ct 872), so that the shipowner will have found adequate way to delegate its obligation of seaworthiness to a non entity, out into oblivion.

3. A careful reading, allowing for lack of education of the petitioner, of the

depositions given by the petitioner herein, will reveal there was an inverse loading process being followed by Lykes Bros. Steamship Co., Inc., at the time of the petitioner's casualty. Cargo was being loaded in the hatch square prior to the completion of loading in the wings of the offending vessel. The same heretofore undenied by the shipowner, is revealed in the following passages of the deposition:

Page	6	Line	10/14
Page	10	Line	17/18
Page	11	Line	5/15
Page	12	Line	12/25
Page	13	Line	7/18

These passages indicate that because of the inverse loading process the petitioner was standing in a work area, where cargo had first been loaded, when the wings had yet to be loaded. This created a trap, hazard and unsafe place in which the petitioner was assigned to work, restricting and limiting him to choose between being crushed to death or suffer the consequences of jumping 10 feet below.

But in arguments on this point the shipowner has heretofore stated that such a condition, if it did exist, was merely a negligent operation. And thus far the shipowner's argument has prevailed with a summary judgment, affirmed by the appellate court in favor of the shipowner. But the

petitioner reurges that an inverse loading procedure is more than mere negligence. It is unseaworthiness in line with such cases as Mahnich v. Southern SS Co., (1944) 321 US 96, 64 S Ct 455; Waterman Steamship Corporation v. Dugan & McNamara, Inc., (1960) 364 US 421, 81 S Ct 200; Grumady v. Joachim Hendrick Fisser, (1959) 358 US 423, 79 S Ct 455.

4. Concerned about the revelation that Will Foster was assigned to work 10 feet above the regular work/deck level, without ingress/egress, exposed to falling cargo, the counsel for the shipowner repeatedly asked questions in the deposition of the petitioner about the size, weight and width of this household box of cargo, as evidenced by the following pages in the said deposition:

Page	6	Lines	10/14
Page	7	Lines	9/16
Page	8	Lines	4/5
Page	9	Lines	I/8
Page	9	Lines	22/25
Page	10	Lines	21/23
Page	11	Lines	21/25
Page	13	Lines	22/25
Page	17	Lines	2/4
Page	22	Lines	2/5
Page	23	Lines	22/25

Once, the deposition was had the counsel for the shipowner, thereafter, was careful never to refer to this condition, even

to the point of never making mention of the same in the appellate court where the instant counsel of the petitioner lodged appeal specifically on this point.

In granting a summary judgment in favor of the shipowner the courts below, like the shipowner's counsel, never made reference to this place of work where the petitioner was high, atop cargo, without ingress or egress, trapped, unable to avoid falling cargo. And since neither the district court or the appellate court made not even the slightest mention or reference to this entrapment the counsel for the petitioner must necessarily speculate that the holding of these lower courts is to the effect that the warrant of seaworthiness excludes from its obligation a work area that is free of entrapment.

But the petitioner avers his entrapment and the shipowner's violation of the Safety Regulations represent an unseaworthy condition and the hazard to which the petitioner was assigned to work was more critical than the dangerous instrument facing Boudoin in Boudoin v. Lykes Bros. Steamship Co., Inc., (1955) 348 US 336, 75 S Ct 382; Boudoin could fight back; Will Foster had a choice to be crushed or jump, and he jumped, thus injuring himself. And the instant petitioner did not have time to contemplate as did the seaman in Aho v. Jacobsen, 249 F 2d 309 (CA 1st 1957),

reversed 359 US 25, 79 S Ct 602 (1959). And unlike the seaman in Mitchell v. Trawler Racer, Inc. (1960) 362 US 539, 80 S Ct 926, who witnessed and knew the properties of spawn deposited on the ship railship rail the instant petitioner could not readily foresee that in the event a box of cargo fell his way he would need immediate access to a place of egress. And to come to a case pointedly decided on the question of ingress and egress the petitioner, Will Foster, was faced with a greater hazard and with far less means of escape than was afforded the seaman in Palermo v. Luckenbach Steamship Co., Inc. (1957) 355 US 20, 78 S Ct 1. Palermo had a choice of two routes, one of which was hazardous. Will Foster had a choice of either being crushed, or jump. He jumped, choosing injury over death.

On the bases of the foregoing cases, the petitioner urges it is merely simple inference to reach the conclusion that the plight of Will Foster was the result of an unseaworthy condition, and that a summary judgment dismissing the petitioner's cause does not properly lie herein.

CONCLUSION

For the foregoing reasons this petition for a writ of Certiorari should be granted.

Respectfully submitted,

CHARLES R. MALONEY
Attorney for the Petitioner,
Will Foster
816 Richards Building
New Orleans, Louisiana 70112
Telephone: 522-9039

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition for Writ of Certiorari on Mr. James L. Schupp, Jr., counsel for respondent by mailing a copy thereof, postage prepaid, addressed to his office at 2141 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130.

Dated this _____ day of _____, 1967.

_____

CHARLES R. MALONEY

United States Court of Appeals
Fifth Circuit
Office of the Clerk

December 6, 1966

Edward W. Wadsworth
Clerk

Rm. 408-400 Royal
St., N. O., La. 70130

Re: No. 23120 - Will Foster vs Lykes Bros. Steamship Company, Inc., et al

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ Edward W. Wadsworth

Edward W. Wadsworth,
Clerk

APPENDIX (A)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23120

WILL FOSTER,

Appellant,

versus

LYKES BROS. STEAMSHIP COMPANY, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(November 4, 1966)

Before THORNBERRY and COLEMAN, Circuit Judges, and YOUNG, District Judge.

PER CURIAM: This is a suit in admiralty by a longshoreman for injuries sustained aboard a vessel of the defendants while it was being loaded at a wharf in New Orleans. Appellant has received the

compensation due him under the Longshoreman's and Harbor Workers' Compensation Act, but further contends that he is entitled to recovery because the vessel was unseaworthy. The District Court granted summary judgment for the defendant.

Careful consideration of the record, including the deposition of the plaintff, reveals no indication of unseaworthiness and that there was no genuine issue of fact thereasto. We must affirm. Admiralty Rule 58, Neal v. Lykes Bros. Steamship Co., 5 Cir., 1962, 306 F 2d 313; McQuiston v. Freighters and Tankers Steamship Company, 5 Cir., 1964, 327 F. 2d 746.

AFFIRMED.

Adm. Office, U.S. Courts - E.S. Upton Printing Co., N.O., La.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WILL FOSTER — DIVISION "B"

versus — NO. 6214

LYKES BROTHERS STEAMSHIP COMPANY, INC., AND SS ZOELLA LYKES — ADMIRALTY

DECREE.

The Court having on September 1, 1965 granted the motion of respondent, Lykes Brothers Steamship Company, Inc., as Owner and claimant of the SS ZOELLA LYKES, for summary judgment:

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of respondent, Lykes Brothers Steamship Company, Inc., as owner and claimant of the SS ZOELLA LYKES, and against libelant, Will Foster, dismissing said libelant's libel with costs.

Dated at New Orleans, Louisiana, on this 12 day of November, 1965.

(signed) FRANK B. ELLIS
UNITED STATES DISTRICT JUDGE

Charles R. Maloney, Esq.
James L. Schupp, Jr., Esq.

SUPREME COURT, U. S.

Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
MAY 1 1967
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1966.

No. 1112

WILL FOSTER,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM E. WRIGHT,
JAMES L. SCHUPP, JR.,
Attorneys for Respondent, Lykes Bros. Steamship Co., Inc.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Building,
2 Canal Street,
New Orleans, Louisiana 70130.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 1112.

WILL FOSTER,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The petition raises no issue which warrants review. There is no undecided federal question involved nor is this Court being asked to resolve a conflict between the circuits. The District Court, on petitioner's own deposition, found no genuine issue as to any material fact and granted summary judgment. The Court of Appeals for the Fifth Circuit affirmed.[1] Petitioner asks this Court to review the facts despite its repeated pronouncements that certiorari will not be

[1] *Will Foster vs. Lykes Bros. Steamship Co., Inc.*, 368 F. 2d 326 (5 Cir. 1966).

granted simply to review the evidence below.[2] We submit the petition is inappropriate and should be denied.

Petitioner was employed by respondent as a longshoreman. On February 23, 1962, he and the other members of his gang were loading cargo aboard the SS ZOELLA LYKES.[3] Large boxes containing household goods had previously been stowed in the forward half of the lower hold.[4] To complete the stowage the longshoremen began stacking smaller boxes of cargo on top of the boxes of household goods.[5]

Petitioner was stowing cargo on top of a box of household goods in the forward end[6] of the hatch when the longshoreman operating the winch caused a load of cargo to strike the ship's coaming.[7] Some boxes were dislodged from the load and fell into the hold.[8] Petitioner saw the boxes falling and jumped down from the box on which he was standing.[9] He successfully avoided the falling cargo but claims to have sprained his ankle in jumping.[10]

Respondent paid petitioner compensation to which he was entitled under the Longshoremen's and Harbor

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[2] *General Talk. Pictures Corp. vs. Western El. Co.*, 304 U.S. 175 (1938); *United States vs. Johnston*, 268 U.S. 220 (1925); *Southern Power Co. vs North Carolina Public Service Co.*, 263 U.S. 508 (1924).

[3] Depo. p. 5.

[4] Depo. p. 13.

[5] Depo. pp. 11, 13.

[6] Depo. p. 11.

[7] Depo. p. 15.

[8] Depo. pp. 15, 16, 17.

[9] Depo. p. 17.

[10] Depo. pp. 14, 26.

Worker's Act,[11] which affords him his exclusive remedy as against his employer. Nonetheless, petitioner then brought this suit against respondent, his employer, claiming damages. We submit that this suit, in contravention of Section 5 of the Act, should not be maintained at all. However, reserving that important point, petitioner, at the very least must show that his injuries were caused by unseaworthiness.[12] This he has not done. The District Court found no evidence of unseaworthiness and entered summary judgment in respondent's favor. The Court of Appeal affirmed.[13]

Petitioner testified unequivocally that his injuries were solely the result of the winch operator's failure to raise the load high enough,[14] not, as claimed in the petition, because petitioner happened to be working on top of cargo previously stowed in the hold, not because of any alleged inverse loading procedure, not because of any alleged violation of safety regulations, not because of any lack of ingress or egress, not because of any obstruction of the winch operator's view and not because of any defect in the ship's winch or cargo gear.

Petitioner's own testimony is that his injury resulted solely from the winch operator's failure to raise

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[11] 33 U. S. C. 901-950, and particularly Section 905.

[12] *Neal vs. Lykes Bros. Steamship Co., Inc.*, 306 F. 2d 313 (5 Cir. 1962); *Puddu v. Royal Netherlands S. S. Co.*, 303 F. 2d 752 (2 Cir. 1962), *cert. denied*, 371 U. S. 840 (1962); *Spinelli vs. Isthmian S.S. Co.*, 326 F. 2d 870 (2 Cir. 1964), *cert. denied*, 377 U. S. 935 (1964).

[13] *Will Foster vs. Lykes Bros. Steamship Co., Inc., supra.*

[14] Depo. pp. 16, 26, 28.

the load high enough to clear the coaming.[15] Petitioner testified:

> "A. He (the winch operator) didn't have the load high enough. He swung there—he didn't have the load high enough. He thought it was high enough but it hit the side of the coaming and knocked the box off." (Parenthetical material supplied.)[16]
>
> * * * *
>
> "Q. There was nothing wrong with any of the ship's equipment—that is, the winch, the gears, the wire cables, the cargo, nothing wrong with the boxes themselves?
>
> A. Not that I know—only that box fell.
>
> Q. Do you know why it fell?
>
> A. It hit the side of the coaming—knocked it off the board."[17]

Petitioner's invocation of *Reed vs. Yaka*[18] does not create a right of action where none exists, nor does it create an issue of unseaworthiness where the fact finder and the appellate court found none,[19] nor does it convert a case in which certiorari is not appropriate into a case where it is. Unlike *Yaka*, this is a direct suit by a longshoreman against his employer and a vessel owned by the employer. *Yaka* involved a suit against an independently owned vessel whose owner impleaded her bareboat charterer, the actual operator, who had expressly indemnified the

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[15] Depo. pp. 16, 18-19.
[16] Depo. p. 16.
[17] Depo. pp. 26, 28.
[18] 373 U. S. 410 (1963).
[19] *Will Foster vs. Lykes Bros. Steamship Co., Inc., supra.*

owner.[20] The suit was not against the employer and no judgment was given the employee against the employer.

Congress has provided a workmen's compensation remedy to the petitioner as against the employer, which remedy is exclusive.[21] Respondent paid petitioner the compensation to which he was entitled under the Longshoremen's and Harbor Worker's Act. The Act being applicable, it is petitioner's exclusive remedy. There are no exceptions whatsoever to the exclusive nature of the Act nor the slightest basis for arguing that the employer is any less the "employer" because he is a shipowner.

The record reflects no violation of the Safety and Health Regulations for Longshoring.[22] In fact, the particular regulations cited by petitioner are wholly inapplicable. We are not dealing here with men or cargo falling from a temporary landing platform,[23] nor from the edge of a hatch section,[24] nor from other stowed cargo,[25] nor from a skeleton deck,[26] nor does this case involve two gangs working in the same hatch on different levels.[27] This is purely and simply a case of a longshoreman jumping out of the way of a falling box and spraining his ankle in doing so. It is not a case of unseaworthiness.

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[20] *Reed vs. S.S. Yaka,* 183 F. Supp. 69, 70 (ED.Pa. 1960).
[21] 33 U. S. C. 905.
[22] 29 C.F.R. 1504 *et seq.*
[23] 29 C.F.R. 1504.32.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] 29 C.F.R. 1504.34.

Petitioner likewise had no criticism of his work area nor of the loading procedure. He testified that the usual procedure for loading was followed,[28] that he frequently climbed on top of boxes of household goods,[29] and that he hadn't noticed anything wrong with the way cargo was being brought into the hold during the day.[30]

Petitioner's testimony reveals that there was ample means of ingress and egress. The entire after half of the hold was open.[31]

The ship's hatch covers were folded completely back[32] and it was physically impossible for the covers to have obstructed the winch operator's view.[33]

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[28] Depo. p. 8.
[29] Depo. p. 14.
[30] Depo. p. 15.
[31] Depo. p. 13.
[32] Depo. p. 20.
[33] Affidavit of Louis G. DeBlois.

The evidence presented to the District Court showed conclusively that there was no evidence of unseaworthiness. The Court of Appeals for the Fifth Circuit, after a full study of the record, affirmed. Petitioner now asks for a third review of the record. We submit that the decisions below were fully supported by the record and that certiorari is completely inappropriate and should be denied.

Respectfully submitted,

.....

WILLIAM E. WRIGHT,

.....

JAMES L. SCHUPP, JR.

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Building,
2 Canal Street,
New Orleans, Louisiana 70130.

CERTIFICATE OF SERVICE.

I, William E. Wright, a member of the bar of this Court do hereby certify that copies of the foregoing brief have been served upon petitioner by mailing same to petitioner's counsel of record, Charles R. Maloney, Esq., 816 Richards Building, New Orleans, La. 70112, first class mail, postage prepaid, at New Orleans, Louisiana on this ... day of April, 1967.

.....

WILLIAM E. WRIGHT.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NUMBER 1112

WILL FOSTER

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your petitioner, Will Foster, prays that this Court grant rehearing of its order of May 15, 1967, denying the Petition for Writ of Certiorari, _____US_____, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein March 3, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING A WRIT OF CERTIORARI

1.

Qui statuit aliquid,
parte inaudita altera,
Acequum licet statuerit,
haud aequus
haud aequus fuerit. (a)

The cause of Will Foster was never a proper candidate for a summary judgment. Yet a summary judgment was granted in the instant case, not because of the evidence, but rather in spite of the evidence and in the absence of evidence. The fact that one Justice, the Honorable Hugo Black, dissented in the May 15, 1967 order, indicates that the instant case does not properly meet the test of "not having a scintilla of evidence." Thus the petitioner prays that since one Justice has seen the probability or possibility that the petitioner could establish by further evidence that his plight, working aloft a box of cargo in the hatch square, while cargo was moving overhead, was an unseaworthy condition, the petitioner urges that the summary judgment, herein, should be reversed, affording the petitioner adequate opportunity to present his case.

2.

Justitia suum cuique
distribuit. (b)

The injuries sustained by the petitioner, herein, proximately resulted from an inverse

loading procedure (i.e., first to the square, then the wings) which was designed administratively by shoreside personnel of the shipowner (which shoreside personnel were neither seamen nor longshoremen). And as a victim ensnared in a trap the petitioner had no time to contemplate, as did the seaman of Aho v. Jacobsen, (1959) 359 US 25, 79 S Ct 602, nor did the petitioner, Will Foster, have a choice of ways and means, as did the seaman in Palermo v. Luckenbach Steamship Co., Inc. (1957) 355 US 20, 78 S Ct 1. Yet a summary judgment was rendered against Will Foster. And it is this summary judgment that does violence to the history of jurisprudence on the warranty of seaworthiness.

Herein McAllister v. Magnolia Petroleum Company (1958) 357 US 221, 78 S Ct 1201 has been re-edited so that an unsafe place in the square of the hatch, proximately causing an accident, must be ignored if the ship, and particularly its winches, were in good working order. And while it may be true that the duty or obligation of furnishing a seaworthy vessel may not be otherwise delegated when a ship officer is involved the instant case represents the rule that the duty can be delegated to shoreside and/or administrative personnel when they merely design by cargo plan or loading procedure an unsafe condition. (c) In the lawbooks the case of Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co. (1964) 376 US 315, 84 S Ct 748, represents authority for the rule that "a stevedore's implied warranty of workmanlike service is

breached even where the stevedoring personnel non negligently supply defective equipment, causing injury to an employee/longshoreman, but herein the summary judgment against Will Foster represents the rule that the administrative negligence (i. e., a cargo plan or loading plan that designed an accident) would not represent actionable negligence for which Will Foster could seek remedy.

The precarious conditions which forced Will Foster to choose between being crushed or jumping to an injury were conditions within the control of the shipowner, and unlike the vicious propensities of Gonzales [d] in Boudoin v. Lykes Bros. SS. Co., Inc. (1955) 348 US 336, 75 S Ct 382 and unlike the spawn that suddenly deposited on the deck of the vessel in Mitchell v. Trawler Racer, Inc., (1960) 362 US 539, 80 S Ct 926 the instant shipowner had administrative supervision over the office personnel that designed and/or prepared the cargo plan or loading procedure whereby a large box of cargo was first loaded to the hatch square, while other cargo was loaded over and around to the wings.

3.

Nemo se tuto diu
periculis offerre tam
Crebris potest quem saepe
transit casus, aliquqndo
invenit. [e]

To evaluate the instant matter the petitioner referred to the case of Kernan v.

American Dredging Company (1957) 355 US 426, 78 S Ct 394 and also the case of Albanese v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij (1965) 382 US 283, 86 S Ct 429. Armed with these holdings he urged his cause with confidence, as the instant case represents definite violations of the sections 9:32 and 9:34 of the Safety & Health Regulations for Longshoring, Public Law 85-742, 72 Stat 835 (amending 44 Stat 1444, 33 USC 941). However, a summary judgment was granted against the petitioner and in favor of the defendant, thus the apparent rule of the instant case is that violations of sections 9:32 and 9:34 of the said act does not render a vessel unseaworthy. And this is most confusing to the petitioner because the same Fifth Circuit Court of Appeals that has heretofore affirmed the offending summary judgment against the petitioner has contrariwise heretofore held that the violation of Section 9:31 (c) represented an unseaworthy condition. See Maning v. M/V Sea Road, 358 F 2d 615 (5 CA 1965).

4.

Summum jus, summa injuria (f)

In affirming the summary judgment of the Honorable Frank B. Ellis, former judge of Section B, the Fifth Circuit Court of Appeals relied on Admiralty Rule 58, the case of Neal v. Lykes Bros. Steamship Co., Inc. (5 CA - 1962) 306 F 2d 313 and the case of McQuiston v. Freighters and Tankers Steamship Company (5 CA - 1964) 327 F 2d 746.

As previously urged the petitioner re-urges: There is no relationship, whatsoever, between the act of twisting one's back while shoveling grain by hand, as exemplified in the McQuiston case to the mechanics of the instant casualty of Will Foster. And with the longshoreman, Neal, of Neal v. Lykes, the only coincidental relationship of that case with the instant case is that both longshoremen worked for the same New Orleans-domiciled corporation and similarly had appellate review of their cases before the same Fifth Circuit Court of Appeals in New Orleans, Louisiana. Beyond that there is no significant coincidence between Neal and Foster.

Had the Fifth Circuit, while ignoring Supreme Court decisions applicable, (g) sought cases decided in the same Fifth Circuit there were cases at hand more to evaluate the instant facts:

In Mills v. Mitsubishi Shipping Co., 358 F 2d 609, the same Fifth Circuit found as a matter of law, reversing a jury verdict to the contrary, that a shaking brake lever, that never broke, rendered a vessel unseaworthy. Notwithstanding that the Fifth Circuit found the Mitsubishi vessel as a matter of law unseaworthy, in spite of a jury verdict to the contrary, the same Fifth Circuit found as a matter of law, via summary judgment, that there was no actionable negligence or unseaworthiness, herein, with reference to a lack of safety nets on an overhead load of cargo, an inverse loading procedure that placed the

petitioner high atop a small area, without ingress or egress. And to come more pointedly to the problem of "ingress and egress" the same Fifth Circuit could have reviewed its Superior Oil v. Trahan case (1964) 1964 AMC 100 wherein two small boats moored alongside a drilling barge were adjudged to be unseaworthy because these boats were without adequate means of ingress or egress to enable a seaman to make a social call to the outboard vessel.

And decided on April 13, 1967, case number 23273, entitled Robichaux v. Kerr McGee Oil Industries, Inc. by the same Fifth Circuit has this peculiar language:

> "... shipowner owes a non delegable duty to furnish a seaworthy vessel, and this duty extends to the intermediary employees who are performing a portion of the ship's work. Seas Shipping Co. v. Sieracki, 328 US 85.... if there is improper use of seaworthy equipment by intermediary employees, resulting in injury to a worker, his claim might squarely come within the doctrine of Sieracki, supra, depending of course, upon whether the injury came at the very moment of the negligent use, or after the negligence of the fellow worker had come to rest and the equipment had been left in an unsafe condition. See Antoine v. Lake Charles

Stevedores, _____F 2d_____ (5-Cir 1956), decided this day. (h)

The petitioner submits that the spirit, if not the holdings, of Mills, Trahan and Robichaux are adverse to the holding herein granting the summary judgment against Will Foster.

CONCLUSION

The petitioner submits that in the original petition and in this petition for a rehearing he has shown that the summary judgment rendered herein in favor of the shipowner and against the petitioner is contrary to law, justice and equity. The rule of law applied herein is wrong and should be overturned.

> It must not be; there is no power in
> Venice
> Can alter a decree established;
> 'Twill be recorded for a precedent;
> And many an error by this same
> example
> Will rush into the state. (i)

WHEREFORE, for the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that the Court withdraw its order of May 15, 1967, refusing the Petition for Writ of Certiorari herein, and that the Court issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES R. MALONEY,
816 Richards Building
New Orleans, Louisiana 70112

Attorney for Will Foster,
Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Charles R. Maloney

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Rehearing on Mr. James Schupp of Messrs. Terriberry, Rault, Carroll & Yancey, by mailing a copy of the same to his office at the International Trade Mart Building.

Dated: July____, 1967.

Charles R. Maloney

FOOTNOTES

(a) "He who decides a case without hearing the other side, though he decides it justly, cannot be considered just." Seneca, Medea CXCIX

(b) "Justice renders to every one his due." Cicero, De Legibus, I, 10

(c) A cargo plan or a loading/discharging procedure by its design can design an accident just the same as driving or operating a vehicle or vessel in the fog.

(d) Gonzales was the aggressive seaman who inflicted injury upon Boudoin in the Boudoin v. Lykes Bros. SS case.

(e) "No one can with safety expose himself often to dangers. The man who has often escaped is last caught." Seneca, Hercules Furens, 325

(f) "Extreme justice is extreme injustice." Cicero, De Officiis, I, 10

(g) The opinion of the Fifth Circuit in the instant case made no reference to any applicable U. S. Supreme Court decision.

(h) The printed opinion of the Court in the Robichaux case indicates what appears to be an erroneous citation: _____. F

2d _____(5-Cir 1956)

(i) Merchant of Venice, Act IV, Sc 1, L 218.